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No. 92-1478

In The

Supreme Court of the United States

October Term, 1992

ROY L. WONDER, et al.,

Petitioners,

vs.

LANRIC HYLAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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INTRODUCTION

Hyland's Opposition to the Petition For Writ Of Certiorari ignores the determinative issues upon which the Court of Appeals decision is based. Hyland does not even address the Court of Appeals' conclusion that the "opportunity to volunteer" constitutes a "valuable governmental benefit." Instead, Hyland opposes the Petition by asserting issues and facts specifically rejected by the Court of Appeals.

The conclusion is clear: Even Hyland, who received the original benefit of the Court of Appeals decision, cannot find any basis to support it. The Petition For Writ of Certiorari should be granted.

Hyland's Opposition Mischaracterizes the Court of Appeals' Decision

Hyland apparently recognizes that the "opportunity to serve as a volunteer" is not a sufficiently valuable governmental benefit to justify federal judicial intervention under the standards set forth in *Perry v. Sindermann*, 408 U.S. 593 (1972). Thus, he opposes the Petition for Certiorari by asserting that "Whether the First Amendment prohibits the government from depriving a person of the subjective benefits of serving as a volunteer in retaliation for free speech . . . is not squarely presented here." Opp. 5. Hyland bases his Opposition on the contention that he was an employee rather than a volunteer.

However, the Court of Appeals expressly rejected Hyland's contention stating: "The relevant question, for the purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather *whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny.*" App. 10, emphasis added. Hyland's Opposition completely ignores the critical conclusion on which the decision is predicated.

Significantly, throughout this litigation, Hyland has relied upon the same facts he has cited here. Both the district court and Court of Appeals concluded that these facts did not render him an employee. The Court of Appeals explicitly found that although Hyland received compensation from January through June 1988, at

the time of his dismissal eight months later he "served the JPD *as a volunteer.*" App. 3, emphasis added. While the Opposition makes much of Hyland's hope that a grant might materialize to provide compensation in the future, that hope was entirely speculative and in any event could not retroactively transform his volunteer status for services already provided into employment.[1]

Thus, neither Hyland's framing of the issues nor asserted factual support for those issues have any relationship to the decision of the Court of Appeals or the propositions for which the decision will be, and indeed already has been cited – namely, that the opportunity to serve as a volunteer is a valuable governmental benefit. *See Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359 (3rd Cir. 1993).

The Issues Presented Are of Enormous Importance To Public Employers

Hyland also contends that even if the case does stand for the proposition that the opportunity to serve as a volunteer is protected, the facts here are "highly unusual," rendering it of limited importance. Nothing in the opinion or the record supports this view. More importantly, it certainly is not shared by public entities. Sixty-seven California cities joined the California League of Cities in filing an amicus brief in support of the Petition for Writ of Certiorari. They did so because of the enormous potential impact of this decision on public entities.

There are two reasons why public entities throughout the country are concerned about the impact of the decision in this case.

First, the Court of Appeals' decision is not limited to the allegedly "unusual" facts of this case. Instead, the Court of Appeals creates a broad new class of valuable governmental benefits which by its express terms applies to any public volunteer situation. Public entities make extensive use of volunteers in their hospitals, zoos, museums, correctional institutions, schools, legislatures,

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[1] Indeed, Hyland's theory violates settled California law prohibiting retroactive pay for services already performed (Cal. Const., Art. XI §10(a)), and providing that public employment must conform to statute. *Williams v. Los Angeles City Dep't of Water & Power*, 130 Cal.App.3d 677, 181 Cal.Rptr. 868 (1982).

libraries, courts, commissions, police functions, youth programs, parks, recreational facilities and election processes. In light of this extensive use of public volunteers, it is simply absurd to suggest that the decision is of little importance and impact. If the decision stands, the mere opportunity to volunteer itself will become a "valuable governmental benefit" that cannot be withheld or restricted in response to speech.

Second, the impact of the Court of Appeals' decision is not limited solely to issues pertaining to volunteers. The broad language of the decision supports the conclusion that virtually any opportunity created by government which could potentially provide "experience," "education," "professional contacts," "expertise," "knowledge" or even "satisfaction" is now a valuable governmental benefit that cannot be withheld on the basis of speech. App. 11.

In creating this broad new class of benefits, the Court of Appeals has departed from the *Perry* standards which courts have previously held limit such benefits to matters which are 1) created by statute; 2) objectively valuable; and 3) of direct and immediate benefit to the recipient. This departure opens the courthouse doors to disputes regarding an unlimited variety of "valuable governmental benefits."

The Court of Appeals' Decision Conflicts With Other Circuits

Hyland asserts that the independent contractor cases cited by petitioners are not in conflict with the decision here. He argues that the reasoning applicable to patronage or lobbying cases such as *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. den.*, ___ U.S. ___, 112 S.Ct. 640 (1991), and *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. den.*, 464 U.S. 1044 (1984) does not apply to free speech cases. This assertion is incorrect. As stated in *Hall v. Ford*, 856 F.2d 255, 262-63 (D.C. Cir. 1988):

> The *Elrod-Branti* line is premised upon concerns similar to those animating the employee speech cases. The *Elrod* plurality [citation omitted] relied upon *Perry v. Sindermann* [citation omitted], a

Pickering case. As a general rule, the government cannot condition employment on the compromise or relinquishment of a constitutional right, be it freedom of belief and association (*Elrod*) or freedom of speech (*Pickering*).

Further, Hyland's attempt to distinguish these cases makes no sense. Under his theory, a public entity is not free to take action based upon speech but may take the same action based upon lobbying activities, political beliefs or affiliations. Petitioners respectfully submit that if the opportunity to serve as a volunteer is entitled to First Amendment protection, there is no logical way to limit that principle so that it does not extend to lobbying activities, political affiliations and beliefs.[2]

The Court of Appeals Decision is in Conflict With Other Circuits Regarding the Appropriate Standards for Balancing Under *Pickering/Connick*

Finally, without discussion, Hyland asserts that the Court of Appeals appropriately remanded for balancing under *Pickering/Connick*. The Court of Appeals' conclusion that such balancing is a question of fact, not law, is directly contrary to other circuits cited in the Petition.

While remand might be appropriate in the absence of a factual record, here the relevant facts are admitted in Hyland's 100 pages of complaint and exhibits. Hyland may now wish to bury his complaint, but the admissions made in the complaint required the Court of Appeals to balance as a matter of law.

Further, as applied in the free speech context, the *Elrod/Branti* analysis provides that individuals in confidential or policymaking positions may be terminated without violating

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[2] Interestingly, Hyland questions whether the independent contractor cases can be reconciled with this court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-79 (1990). Opp. 10. This question itself calls out for review in this case. In the absence of direction from this Court, the circuits have decided that *Rutan* is inapplicable to cases outside the employment area. This case presents an excellent vehicle for addressing these issues.

the First Amendment. The analysis requires resolution of three questions: 1) does the employee operate in an area affecting policy; 2) is the employee a confidential or policy level employee; and 3) is the government's "interest in accomplishing its organizational objectives through compatible policy level deputies . . . implicated by the employee's speech?" To fall outside First Amendment protections, "the employee's speech must relate to policy areas for which he is responsible." *Hall,* 856 F.2d at 264.

It is clear from the face of Hyland's complaint, and indeed, from the face of the Court of Appeals' decision, that, while not employment, Hyland's status as a volunteer met each of these tests. Further, his speech was directly related to the very policy areas to which he had been assigned as a volunteer. Thus, the Court of Appeals was required to examine and rule on these issues as a matter of law.

CONCLUSION

Hyland's Opposition does not address the central issue and holding of the Court of Appeals' decision. The reasons cited by Hyland for rejecting the Petition do not withstand even minimal scrutiny. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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